No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds of royalties pursuant to FPC Opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Does Sun have a constitutionally protected right to escape payment of its debts as ordered by a court in a forum willing to hear the case just because an action on the debt would be outlawed in another jurisdiction?

2. Does the Constitution forbid the Courts of Kansas from applying Kansas' procedural rules, including its statute of limitations, to claims arising outside the State of Kansas?

3. Should this Court review the Kansas Court's determination that the laws of Texas, Oklahoma and Louisiana would allow royalty owners in those states to collect interest on their royalty suspended by Sun at the same rates as Sun agreed to pay its pipeline customers?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is a class action to recover prejudgment interest on suspended gas royalties held and used by Sun Oil Company for several years.

The action was filed on August 23, 1979, in the District Court of Barber County, Kansas, by plaintiffs Wortman (a citizen of Kansas) and Moore (a citizen of Oklahoma) against Sun Oil Company, a Delaware cor-

poration. A class was certified by the District Court consisting of all royalty owners and overriding royalty owners to whom Sun made payment of suspended royalties in 1976 and 1978 pursuant to certain Federal Power Commission Opinions. (J.A. 114, 115, 44.)

The oil and gas leases between the plaintiff class royalty owners and Sun, whether in Kansas or any of the other five states involved, provided that the royalty owner should receive from Sun a royalty (usually 1/8th of the proceeds) from the sale of gas. The price of the natural gas involved in this case was regulated by the Federal Power Commission, later the Federal Energy Regulatory Commission.

Sun was permitted to sell the gas at a higher price by FERC orders. In order to collect the higher price pending judicial review of the FERC orders, Sun complied with a regulation of the FERC and filed its undertaking to account for the extra charges and to refund the same if required by the commission at interest rates set out in Section 154.67 of the Code of Federal Regulations. (J.A. 81-85).

Instead of paying the royalty owners the increased proceeds for the sale of gas, and instead of investing the royalty owners' share of the money for their benefit, Sun simply kept the money and used it in its business. (J.A. 73.)

In July of 1976, Sun paid out to its royalty owners the principal amount of the royalty owners' share of certain money which had been accumulated and used by Sun between July, 1974 and April, 1976.

In April of 1978, Sun paid out to its royalty owners the principal amount of the royalty owners' share of other

money which had been accumulated and used by Sun between December of 1976 and April of 1978. (J.A. 116.)

The royalty owners' money which was used by Sun could never belong to Sun, regardless of the final determination of the FERC rates. This money would either belong to the royalty owners, or be refunded to the gas purchasers, with interest, or part to one and part to the other. (J.A. 133.)

In 1976 and 1978 when Sun made the two payouts of additional royalties, Sun did not pay any interest to the royalty owners nor did it say anything about interest or the use of the money, even though several Appellate Court cases had been decided between 1974 and 1978 requiring payment of interest on such monies. (J.A. 133-135.)

The Kansas District Court ruled that Sun was liable for interest to the royalty owners at the same rates that Sun would have been required to pay on refund to its purchasers under the FERC undertaking. (J.A. 95.) The Kansas Supreme Court affirmed, *Wortman v. Sun Oil Company*, 236 Kan. 266 (1984). (J.A. 113.) The Kansas Supreme Court rejected Sun's argument on limitations, stating that the Kansas five year statute of limitations applicable to written contracts applied to these additional royalties due under oil and gas leases. (J.A. 122-123.)

After decision by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court vacated the Kansas judgment and remanded the case for further consideration in the light of the *Shutts* case. *Sun Oil Company v. Wortman*, No. 84-1971, 106 S. Ct. 40 (1985). (J.A. 125.)

The Kansas Supreme Court then remanded the case back to the District Court. (J.A. 128.)

The case was fully briefed in the District Court and oral argument was had on April 29, 1986. The District Court considered the interest laws of the states involved and found:

> "All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used." (J.A. 132.)

Sun then appealed again to the Kansas Supreme Court, *Wortman v. Sun Oil Company*, 241 Kan. 226 (1987). The Kansas Court, in deciding this appeal, referred to *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764 (1987), which the Kansas Supreme Court had decided a month before. In deciding *Shutts*, the Kansas Supreme Court recognized that this Court had ruled that the application of Kansas law to all of the claims for interest violated the due process and full faith and credit clauses of the Constitution. *Shutts v. Phillips Petroleum Co.*, 240 Kan. at 767. The Kansas Court quoted from the earlier decision of this Court as follows:

> "Petitioner claims that Kansas law conflicts with that of a number of states connected to this litigation, especially Texas and Oklahoma. These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard. . .
>
> "The conflicts on the applicable interest rates, alone - which we do not think can be labeled 'false conflicts' without a more thorough-going treatment than was accorded them by the Supreme Court of Kansas - certainly amounted to millions of dollars in liability. We think that the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its law to all claims would be constitutional." (472 U.S. at 816-18.)

The Supreme Court of Kansas then reviewed the law of the other involved states as to 1) whether there was liability to the royalty owners for interest on the suspended royalties; and 2) if there was liability, then what the interest rate should be.

After review of the law of the five other states, the Kansas Supreme Court stated:

> "Based upon the law of the five enumerated jurisdictions as above reviewed, and upon all of the facts, conditions and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust enrichment to hold Phillips liable for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R., Section 154.102 (1986), to the time of judgment herein." (240 Kan. at 800.)

The Kansas Supreme Court affirmed the District Court's ruling that each of the involved states would hold Sun liable for prejudgment interest at the same rates mandated by Sun's FPC undertaking. (J.A. 150.)

The Kansas Court did find that each of the states would assess postjudgment interest at a different rate,

and the Court ruled that postjudgment interest should accrue at the statutory postjudgment rates of the various states. (J.A. 150.)

The Kansas Court rejected Sun's contention that application of the limitations statutes of the other states was required, and ruled that the Kansas five year statute of limitations applied. (J.A. 155.)

Sun's Petition for a Writ of Certiorari was granted on October 19, 1987.

SUMMARY OF ARGUMENT

The application by Kansas of its statute of limitations to the claims in this case follows the traditional rule that the limitations law of the forum applies. This rule was well established in the common law before our Constitution was adopted and before the adoption of the Fourteenth Amendment. The rule has been repeatedly approved by this Court.

The other states involved in this litigation, Texas, Oklahoma and Louisiana, all treat their statutes of limitations as procedural - as a part of the remedy, and not as a part of the right. All three states would have applied their own statutes of limitations if this case had been brought in any of those states. Application by Kansas of its rule, which is the same rule that the other states would have followed in similar circumstances, cannot offend the rights or interests of the sister states.

Application of the Kansas statute of limitations in this case is not arbitrary because statutes of limitations serve interests of distinctive concern to the forum. It is up to the forum state, which furnishes the court, to determine how long its courts will be open for litigation

and to determine when claims are too stale to litigate. This interest is independent of the interests of potential defendants or the interests of other states. The policies incorporated in statutes of limitations determine not only when the courts of a jurisdiction will be closed to litigation, but also represent that jurisdiction's determination to furnish a forum when that jurisdiction believes the claim can be fairly litigated.

Defendant cannot claim surprise by the application of the Kansas statute of limitations to an action brought in the Kansas Court. Sun does business in Kansas, and has a registered agent in Kansas. Sun carries on the same business in Kansas for which it is being sued in this case. If Sun had any expectations as to statutes of limitations which might apply to suits brought against it in Kansas, it would have no reasonable expectation other than that the law of the forum would apply.

Plaintiffs concede that action to recover interest on the 1976 payout would have been procedurally barred by Louisiana's three year statute, had this action been brought in a Louisiana Court. However, the action would have been timely in all other jurisdictions, including Oklahoma and Texas.

Texas law on the payment of prejudgment interest has been clarified since 1985. In a series of cases beginning with *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Texas 1985), the Texas Appellate Courts have enunciated a policy on prejudgment interest which clearly requires that the rate agreed upon in the FPC undertaking would be the rate of interest awarded in Texas. The only Louisiana case in point required interest to be paid to the royalty owners at the FPC rates.

Although there is no Oklahoma case in point, analysis of the Oklahoma statutes and analogous cases indicates that Oklahoma would decide the question the same way. The "putative" conflicts suggested by Phillips in *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985), are more illusory than real. These alleged conflicts were carefully considered by the Kansas Court, and that Court's determination should not be disturbed.

ARGUMENT

I. Application of the Kansas Statute of Limitations in This Case Does Not Violate the Fourteenth Amendment Due Process Clause or the Full Faith and Credit Clause

The longstanding recognition of the rule allowing application of the forum's statute of limitations requires rejection of the constitutional challenge.

Sun acknowledges that the traditional rule is that the limitations law of the forum applies. This has been the accepted conflicts of law rule in American jurisdictions since the adoption of our Constitution. This Court has clearly and frequently recognized the constitutionality of the rule.

Almost 150 years ago in *M'Elmoyle v. Cohen,* 38 U.S. (13 Pet.) 312, 327 (1839), the Court stated that it was "well settled," that statutes of limitations were a matter of remedy "and consequently that the lex fori must prevail." A statute of limitations, said the Court, "is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of the sovereignty by which it exercises its legislation for all persons and property within its jurisdiction."

The Court thus recognized that the current Kansas rule was the accepted rule of the common law even in 1839 and that there was nothing in the Constitution to forbid it. At the time *M'Elmoyle* was decided, the Fourteenth Amendment due process clause was not a part of the Constitution. But even after adoption of the due process clause, the Kansas rule remained the accepted rule in most common law jurisdictions. See, e.g., *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 517 (1953). Thus, the rule was embodied in the first Restatement of the Law of Conflict of Laws in 1934 (Sections 604, 605); and it was again embodied in the Restatement (Second) of the Conflict of Laws, published only 16 years ago, in 1971 (Sections 142 and 143). The widespread acceptance of the rule has been frequently noted over the years by this Court, which has repeatedly and consistently echoed the *M'Elmoyle* pronouncements approving the rule.

For example, in *Great Western Tel. Co. v. Purdy,* 162 U.S. 329, 339 (1896), the Court citing *M'Elmoyle,* stated:

> "The limitation of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is bought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions."

In *Home Ins. Co. v. Dick,* 281 U.S. 397, 409 (1930) (footnote omitted), the Court noted that "in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." In *Order of United Commercial Travelers of America v. Wolfe,* 331 U.S. 586, 607-609 (1947), the Court again recognized that the rule currently followed in Kansas was "well estab-

lished" and constitutional. And in *Wells v. Simonds Abrasive Co.*, 345 U.S. at 516-517, the Court several times reaffirmed its prior approval of the "well established rule that the forum state is permitted to apply its own period of limitation."

This history not only demonstrates the settled view of the Court, but is decisive in two other ways as well. First, the widespread acceptance and repeated approval of the Kansas rule—at all relevant times in our constitutional history, including before and after adoption of the Fourteenth Amendment—demonstrate that those who drafted and adopted the due process clause and the full faith and credit clause cannot have imagined that they were casting doubt on, let alone invalidating, this ancient rule. This point bears critically on the understanding of those who adopted the Constitution and the Fourteenth Amendment, but it is relevant as well to the basic principles embodied in the two clauses. As Justice Holmes, speaking for the Court, once said, "If a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). A rule of such long standing and as well known and widely accepted as the Kansas rule should not suddenly be held to have become offensive to the notions of federalism and fairness that the two constitutional provisions at issue protect. Indeed, so far as we are aware, this Court has never overturned under either provision a choice of law rule of the vintage of the Kansas rule.

A second point, relevant to the due process issue, is closely related. There can be no unfair surprise to Sun, no upsetting of its expectations, when a court merely follows a rule with a history like that of the Kansas rule. As noted below, it is the unexpected that can cause due process problems for a state's choice of law. Sun, which has done business in Kansas and voluntarily subjected itself to suit there for years, can have no due process complaint when it is faced with a familiar, long established, widely accepted, and repeatedly approved choice of law rule such as the Kansas rule permitting the forum to apply its own statute of limitations.

II. Application of the Forum's Statute of Limitations in This Case Does Not Impair Any Sister - State Interest and Is Not Arbitrary or Fundamentally Unfair

Sun urges this Court to brush aside over 100 years of history and to accept the notion that a new era has dawned in the constitutional principles governing choice of law. Sun suggests that the distinction between procedural rules and substantive law be abolished and that limitations rules be considered as substantive law.

Sun's proposed rule treating the choice of limitations period akin to the choice of substantive law may well have much to recommend it as a matter of policy; but for hundreds of years most common law jurisdictions thought otherwise. It would be inconsistent with the federalist idea reflected not only in the full faith and credit clause, but also in the due process clause, see *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), to interfere with the freedom of states to make just such changes in policy.[1]

1. While the purpose of that provision (the Full Faith and Credit Clause) was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. (*Pacific Ins. Co. v. Comm'n.*, 306 U.S. 493 (1939).)

There has been no transformation in the principles governing constitutional limits on choice of law so as to require analysis to begin, as appellant suggests, with a footnote in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984), or to require a wholly new analysis of the issue. This Court has never repudiated older cases in the area. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-13 (Plurality Opinion). Rather, this Court has always taken pains to decide cases narrowly on their facts and has taken account of and preserved prior rulings in later opinions. Older cases are thus still good law. Indeed, as *Allstate* makes clear, to the extent any change has occurred over the years, the constitutional limits on choice of law have been loosened, not tightened.

Those limits, expressed in numerous rulings on the constitutionality of choices of law in a wide variety of circumstances, have consistently focused on two broad principles—avoiding impairment of sister-state interests and prohibiting unfairness to litigants. (See, e.g., *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978-81; *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-13.)

According to the most recent decision on this issue by the Supreme Court, a choice of law is unconstitutional only if it is "arbitrary" or "fundamentally unfair." (*Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978.) Contrary to Sun's suggestion, this Court has not attempted to dictate the state's choice of law rules, but in the *Allstate* and *Phillips* cases, supra, has confirmed that "in many situations, a state court may be free to apply one of several choices of law." In choice of substantive law, the forum state's contacts need only be sufficient to avoid unjustified impairment of sister-state interests and arbitrary or fundamentally unfair treatment of litigants, and

these standards place only "modest restrictions on the application of forum law." (*Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978.) Application of these principles to the Kansas choice of limitations law in this case demands rejection of the constitutional challenge.

III. Application of the Kansas Statute of Limitations in This Case Impairs No Interest of the Other States Involved

Sun suggests that adoption of the Kansas limitations law would offend the interests of Louisiana, Texas and Oklahoma in this litigation. To the contrary, the Kansas Court's adoption of its own statute of limitations in this case would fully respect the interests of the other states, whose laws have been determined to require that Sun pay interest to plaintiffs.

First, declining to apply the other states' statutes of limitations impairs no right created by these states because all of these states treat their applicable statute of limitations as a part of the remedy, not as a part of the right. See *Fenton v. Sinclair Refining Co.*, 283 P.2d 799 (Oklahoma 1955), *Los Angeles Airways, Inc. v. Lummis*, 603 S.W.2d 246 (Texas App. 1980) and *Page v. Cameron Iron Works, Inc.*, 259 F.2d 420 (Louisiana 1958).

These states regard their statutes of limitations as bearing only on their own interests in the administration of justice and not on the underlying rights and obligations of the parties. In none of the three states would the limitations period extinguish defendant's obligation to plaintiffs, and therefore failure to apply the limitations period of those states in no way resurrects an obligation that had been laid to rest by those states' limitations laws. To put the same point another way, the

interest of Oklahoma, Louisiana and Texas in regulating the conduct of defendant is not affected by the choice of a statute of limitations.

The other three states treat their statutes of limitations as procedural, and in the courts of each of these states, the statutes of limitations questions would be regarded as matters of forum law. *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 P.2d 1236 (Oklahoma 1972); *Hobbs v. Hajecate*, 374 S.W.2d 352 (Texas 1964); *Kirby Lumber Co. v. Hicks Co.*, 80 So. 663 (Louisiana 1919). All of these states follow the same rule followed by the Kansas Court in choice of limitations law. For Kansas to follow the rule that the other states would follow in similar circumstances cannot offend the interests of the sister states.

These considerations are sufficient by themselves to show that no sister state interest is impaired by the Kansas Court following the traditional choice of law rule on statutes of limitations.

Of course, the other states could, if they wished, export their statutes of limitations along with their transitory causes of action by declaring their limitations period a part of the underlying rights. Though obviously long aware of the Kansas rule (since the rule is the traditional common law rule, and, indeed, the same as the rule in the other three states), the other three states have not chosen to protect themselves in this way. Evidently, these states do not feel their interests impaired by the adoption of the Kansas statute of limitations in Kansas Courts.

IV. Application of the Kansas Statute of Limitations in This Case Is Neither Arbitrary nor Fundamentally Unfair

The law's long treatment of statutes of limitations as procedural, while not perhaps in itself resolving the constitutional question, is the foundation of the answer to any charge of arbitrariness. With respect to any rule that is procedural, and with respect to statutes of limitations in particular, the forum has a separate and distinct set of interests supporting selection of its law. Thus, Kansas has interests in establishing the rules under which its judicial system will operate, and these interests extend to determining the fundamental question of when the system will be open for a hearing on the merits. It is because of these independent forum interests that, even in cases in which other "nonprocedural" interests are also present, the line between substantive and procedural rules must generally survive the constitutional choice of law analysis that focuses on arbitrariness and unfairness. Not surprisingly, Sun points to no case—and as far as we are aware, there are none—in which this Court has struck down a procedural rule as violating constitutional limits on choice of law. Because statutes of limitations, though they may be "outcome determinative," serve interests of distinctive concern to the forum, the choice of the forum's limitation period under the Kansas rule comports with constitutional standards.[2]

2. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), the Supreme Court noted that it had previously "adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules

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Statutes of limitations "represents a public policy about the privilege to litigate." (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304.) It was long recognized that each state's courts have a strong interest, independent of the interests of defendants or the interests of sister states, in deciding for themselves when a claim is no longer fresh enough to adjudicate. Thus, as the Restatement (Second) of Conflicts, Section 142 at 396 (1971) states:

> "Each state determines for itself the period during which suit may be brought in its courts upon a particular claim."

The policy behind this rule is not merely the negative one of keeping stale claims out of court; it is also the affirmative "policy to permit actions to be brought at any time within the prescribed period." (Restatement of Conflicts, Section 604 at 721 (1934).) The long standing common law rule (the current Kansas rule) rests on the judgment that, at least when the sister state that defined the right of action has not conditioned the right on a specified limitations period, these separate forum policies fairly address all concerns about staleness and repose. It is not arbitrary for Kansas to insist, in these circumstances, that staleness is the primary concern and that Kansas will make its own judgment on that issue.[3]

Footnote continued—

in which stability is of prime importance and those in which flexibility is a more important value." Chase held that a state could constitutionally revive a cause of action by extending the applicable statute of limitations.

3. Sun's emphasis on somehow having been deprived of a personal right misconceives the nature of statutes of limitations. As this Court recognized long ago, a statute of limitations is primarily of concern to courts, and only derivatively of concern to litigants.

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Sun suggests that Kansas has an interest only in keeping litigation out of its Courts so that applying a limitations period shorter than that of the other states would be constitutional whereas applying a longer period would not. This suggestion ignores the obvious interest that Kansas has in making a forum available to individuals, like the plaintiffs, who are victims of wrongful conduct. As this Court has recently had occasion to observe in another context,

> "It is possible to describe litigation itself as an evil that the state is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. . .
>
> "But we cannot endorse the proposition that a law suit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered

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Footnote continued—

"Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the court from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted.) They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process, but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a "fundamental" right or what used to be called a "natural" right of the individual." (*Chase Securities Corp. v. Donaldson*, 325 U.S. at 314.)

a legally cognizable injury turns to the courts for remedy: 'We cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.' (*Bates v. State Bar of Arizona*, 433 U.S. at 376.) That our citizens have access to the civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride." (*Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2277-78 (1985).)

Kansas has determined to follow this general policy of furnishing claimants a forum when it believes the claim can be fairly litigated and when the state that created the cause of action has not announced that the right of recovery is extinguished when its limitation period expires. There is nothing arbitrary in this determination.

Even under Sun's view of the applicable Louisiana statute of limitations, as to the 1976 payout only, this case was filed only one or two months out of time, and Sun does not contend that anything changed during those one or two months to undermine the fairness of requiring it to defend on the merits. This case involved few disputed facts, and is based upon information in Sun's own accounting records. Sun cannot claim any unfair surprise or upsetting of its expectations in the Kansas Courts' choice of the forum statute of limitations. See *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 1280. Sun was actually doing business in Kansas, and had a registered agent in Kansas. Sun was carrying on the same business in Kansas for which it is being sued in this case.

Sun raises the specter of "forum shopping." Richard Wortman, one of the named plaintiffs and class representatives in this action, lives in Medicine Lodge, Barber County, Kansas, as do his attorneys. This action was filed in

Barber County District Court, just across the street from his attorneys' offices. There was no forum shopping here.

It seems to plaintiff that the point at issue with regard to the statute of limitations is not whether the American Law Institute has discussed changes in its Restatement of Conflicts of Laws or whether Great Britain has modified its statutes regarding choices of laws on foreign claims, or whether the use of the traditional common law choice of law rules may encourage forum shopping, but rather the question is whether this ancient rule violates the Constitution of the United States. For all the above reasons, the answer to that question is no.

V. None of the Claims Would Be Time-Barred in Texas or Oklahoma

Sun argues that the limitations laws of Oklahoma, Texas and Louisiana would bar the plaintiffs' claim. Plaintiffs concede that the Louisiana law on limitations for collection of royalty would bar recovery of interest on the 1976 payout had this action been brought in a Louisiana Court and had Louisiana applied its own limitation law.

However, the statutes of Oklahoma and Texas allow five and four years respectively, and Sun is in error in citing those states' shorter limitations statutes not dealing with suits to collect royalties (which necessarily arise out of a written contract - the oil and gas lease).[4]

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4. The Texas and Oklahoma limitations statutes are as follows:

Texas Statutes Annotated, art. 5527. *What actions barred in four years.*

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

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The Texas four year statute has been applied to suits for additional royalty. (*Foster v. Atlantic Refining Company*, 329 F.2d 485 (1964); *Humble Oil & Refining Co. v. Fantham*, 268 S.W.2d 239 (1954).)

Under Texas law, "an action is 'founded upon a written contract' within four-year statute of limitations, though instrument relied upon contains no express promise to do the things for nonperformance of which the action is brought, if the obligation or liability upon which action is based grows out of a written instrument, not remotely but immediately, or if written instrument acknowledges a state of facts from which, by fair implication, the obligation or liability arises. Rev. St. 1295, art. 5527." (*International Printing Pressmen & Assistants Union of North America v. Smith*, 198 S.W.2d 729 (1947).)

Oklahoma's statute allows five years to bring "an action upon any contract, agreement or promise in writing." (*Smith v. Texas Pipeline Co.*, 171 Okla. 573 (1935).)

VI. The Kansas Court Determined the Laws of Louisiana, Oklahoma and Texas Under the Proper Constitutional Standard, and That Determination Should Not Be Disturbed

Sun complains that the Kansas Courts misconstrued the substantive laws of Louisiana, Oklahoma and Texas in the Kansas Court's finding that each of these states would require payment of interest to the royalty owners

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Footnote continued—

"1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."

12 Okla. Stat., Section 95. *Limitation of other actions.*

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years: An action upon any contract, agreement or promise in writing."

at the rates Sun had agreed to pay in its undertaking with the Federal Power Commission.

The Kansas Supreme Court, in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, made a detailed analysis of the Louisiana, Oklahoma and Texas law. *Shutts v. Phillips Petroleum Co.*, 240 Kan. 769-793. This analysis was undertaken by the Kansas Court with full recognition of the mandate of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Kansas Court found that each of the states would require payment of interest on the suspended royalties and that each of the states would find interest payable at the same rates agreed upon by Phillips in its Federal Power Commission undertaking. Sun's bald statement that the Kansas Court "evaded" or "disregarded" the governing laws of these states is without basis in the record. Oklahoma has no cases directly in point, and the Kansas Court tried to determine what the Oklahoma Courts would do if presented squarely with the issues in this case. Louisiana and Texas have a body of law on cases of this type, and the Kansas Court faithfully considered these cases, as well as the statutes of the two states in arriving at its determination. There is nothing to suggest that the Kansas Court was not mindful of the mandate in *Shutts II* or to suggest that the Kansas Court did not candidly construe the laws of these three states. Something more than an error of construction is necessary in order to entitle a party to review by this Court under the full faith and credit clause. See *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) and *Kryger v. Wilson*, 242 U.S. 171 (1916).

A. Louisiana

Louisiana Courts have considered the liability for interest and the rate of interest in cases such as this one.

Boutte v. Chevron Oil Company, 316 F. Supp. 524 (E.D. La. 1970), affirmed, 442 F.2d 1337 (5th Cir. 1971), was a class action by certain landowners to set aside a mineral lease held by Chevron. The landowners asserted that Chevron had failed to pay royalties as required by the lease. In its findings of fact the Court stated:

> "Chevron applied to the FPC for approval of an increased rate of 23.675 cents and, on June 4, 1959, the FPC entered an order permitting the increased rate to become effective April 1, 1959, without, however, approving the rate, and subject to the limitation that:
>
> "Chevron shall, in accordance with its agreement and undertaking, refund at such time and in such amounts to the parties entitled thereto, and in such manner as may be required by final order of the Commission, the portion of the increased rates found by the Commission in this proceeding not justified, *together with interest thereon*." (Emphasis in original.) (316 F. Supp. at 327.)

Chevron withheld royalties on the increased prices it was receiving pending final FPC approval. This suit was filed and decided prior to FPC final approval of rate increases requested by Chevron.

In its Conclusions of Law, the Court ruled Chevron could properly retain the increased prices pending FPC approval. The Court stated:

> "A judgment which would impose on Chevron an obligation to pay royalties on that part of the funds received from the sale of gas which is subject to possible refund to pipeline purchasers, before Chevron's refund obligation has been determined by final order of the FPC, would deprive Chevron of its property without due process of law and subject it to a multiplicity of legal actions. Therefore, Chevron's calculation of the payment of royalties to plaintiffs is correct. (316 F. Supp. 531.)

The Court distinguished the *Whitehall* case cited by Sun:

> "*Whitehall Oil Co. v. Boagni,* is distinguishable on its facts, particularly in view of the fact that the lease in that case provided that:
>
> "In any case where lessee sells gas or plant products of his and lessor's, lessor shall receive the same price and terms as lessee. . ." (316 F. Supp. at 531.)

The Court in *Boutte* stated that if the FPC granted approval of the rates, then the royalty owners would be entitled to recover interest as set forth in the FPC undertaking.

> "In the event that the FPC approves the provisionally increased rates or any part thereof, interest shall be due and payable, at the rate finally adopted by the FPC, to the royalty owners on the differences between any increase in rate, as finally determined by the FPC, and the amounts previously paid to the royalty owners." (316 F. Supp. at 531.)

Whitehall Oil Co., Inc. v. Boagni, 217 So.2d 707, affirmed, 229 So.2d 702 (La. 1969), is not in point. It was decided under the articles of the Louisiana Civil Code dealing with "payment of a thing not due." (217 So.2d 707 at 709.) Plaintiffs' claims against Sun are obviously not governed by these articles.

B. Oklahoma

There are no Oklahoma cases involving liability for interest on suspended royalties. Thus, the Kansas Court

reviewed Oklahoma statutes and court decisions to determine how Oklahoma Courts would rule on this question, if it were presented to the Oklahoma Court. This analysis is set out in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 778-784. The Kansas Court concluded that Oklahoma would allow interest on the suspended royalties in this case, and that interest would be allowed at the rate required by the FPC regulation.

The Kansas Court's determination of Oklahoma state law on this issue, where no Oklahoma cases in point exist, is similar to the process engaged in by federal courts every day in attempting to predict what state courts would hold if squarely faced with the issues of the case under consideration. The Kansas Courts examined the relevant statutes and the decisions of the Oklahoma Courts in analogous or related areas, and decided that Oklahoma law would require payment of interest at the rates agreed to by Sun in its FPC undertaking. Such determination by a state court has traditionally been held not to be reviewable by this Court.

C. Texas

There is no doubt that Texas would require Sun to pay interest on the suspended gas royalties. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978).

In the *Stahl* case, supra, Phillips filed a declaratory judgment action against Stahl seeking a declaration that it was not liable for the suspense proceeds already paid to Stahl, and in the alternative, that it was not liable for interest thereon. (569 S.W.2d 482.) Stahl had not asserted any claim to interest prior to the time Phillips filed its declaratory judgment action, but Stahl did join issue with a counterclaim for 6% interest. (569 S.W.2d

482, 483.) The Texas Supreme Court found that it would be equitable to compensate Stahl for Phillips' use of the money which Phillips held and used.

> "As to the funds attributable to payment for Stahl's gas, Phillips had no possible right or title. It was in the position of a stakeholder who used royalty monies which were held in suspense. . .
>
> "In the present case Phillips knew that funds attributable to payment for Stahl's gas either would be paid to Stahl or refunded to its customers with interest. It made a conscious choice, without any permission or consent of Stahl, to commingle these so-called suspense funds with its general operating funds. Therefore, it should pay for the use of the sustainable portion of this money." (569 S.W.2d 485.)

As Stahl did not request interest at any rate higher than 6%, and that question was not decided by the Texas Supreme Court, the *Stahl* case is not authority for a limit of 6% interest.

The Texas Supreme Court's holding with regard to allowance of interest had been foretold in a series of federal cases in Texas, including *Phillips Petroleum Company v. Adams*, 513 F.2d 355 (1975). In that case, arising on essentially the same facts, the United States Court of Appeals stated:

> "In this case, Phillips collected money over a period of several years which would ultimately be refunded to its customers or paid to its suppliers; in no event did Phillips ever have the slightest prospect of entitlement to the entire principal sum of suspense money here in question. This money was not placed in an escrow account, nor was it paid to the suppliers as it accumulated, subject to refund, with interest -

a course of action followed by Phillips in other instances. (Footnote omitted.) Instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at 7% interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillips' contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction. (513 F.2d 366, 367.)

"We also conclude that Phillips must pay interest on the principal sum of the suspense money, and we accordingly reverse the judgment of the District Court on this point. Texas Courts do not insist on statutory rigidity in the allowance of interest, for they realize that the right to interest is a market place concept, and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long and not pay a cent for it. (513 F.2d 370.)

Texas prejudgment interest law has developed considerably since the *Stahl* case. In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), the Texas Supreme Court judicially authorized prejudgment interest in personal injury cases:

> "The time has come to revise the prejudgment interest rule to make injured parties whole and restore equity and symmetry to this area of the law. We therefore hold that, as a matter of law, a prevailing plaintiff may recover prejudgment interest compounded daily (based on a 365-day year) on damages that have accrued by the time of judgment. To the extent that other cases conflict with this holding, they are overruled. Prejudgment interest shall accrue at the prevailing rate that exists on the date judgment is rendered according to the provision of Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 Section 2 (Vernon Supp. 1985). In addition to achieving full compensation, awarding prejudgment interest in personal injury cases at a rate close to the market rate will also serve to expedite both settlements and trials." (696 S.W.2d 553, 554.)

The new Texas rule on prejudgment interest applies to all cases in the judicial process when *Cavnar* was decided. *Benavidez v. Isles Construction Co.*, 726 S.W.2d 23 (Tex. 1987.)

The *Cavnar* ruling was extended and clarified in later cases. The Texas Courts have judicially limited the application of the 6% statute. It now applies *only* to cases "involving a fixed sum ascertainable from the contract itself" where there is no agreement as to the rate of interest to be paid. (*Acco Constructors v. Nat. Steel Products*, 733 S.W.2d 368 (Tex. App. 1987).)

In all other cases, the rate to be applied is the contract rate or if no contract, the Texas postjudgment statutory rate. *Allied Bank West Loop N.A. v. C.B.D. & Associates, Inc.*, 728 S.W.2d 49 (Tex. App. 1987) and *McCann v. Brown*, 725 S.W.2d 822 (Tex. App. 1987).

It seems clear that Texas would find liability for interest at the rate Sun agreed to in the FPC undertaking on equitable principles, or, alternatively, because of the fact that there was a written agreement for interest to be paid on this same money. In *International Printing Pressmen & Assistants Union of North America v. Smith*, 198 S.W.2d 729 (Tex. 1947), the Texas Supreme Court found the constitution and by-laws of a union to be a written contract on which a wrongfully expelled union member could bring suit, even though the constitution and by-laws were not expressly made a contract between the union and its member. As against the contention by the union that the constitution and by-laws did not contain any express promise to do the things for the nonperformance of which the union member sued, the Court stated:

> "It is sufficient if the obligation or liability grows out of a written instrument, not remotely, but immediately, or if the written instrument acknowledges a state of facts from which, by fair implication, the obligation or liability arises."

The Texas appeals case cited by Sun, *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (1986), apparently comes under the definition set out in Tex. Rev. Civ. Stat. Ann. art. 59-1.03, of an account in which the sum payable is ascertained from the contract itself, and thus the 6% interest under Texas law applies.

The contract here (Sun's undertaking with the FPC) does not attempt to ascertain the sum payable, but does imply an obligation to pay interest on the money received in advance of final judgment on the FPC order.

CONCLUSION

Application of the Kansas statute of limitations to all claims in this case does not violate either the Fourteenth Amendment or the Full Faith and Credit Clause of the Constitution. The Constitution does not require that *every* choice of law decision made by a state court be supported by significant contacts between the litigation and the state whose law is chosen.

Statutes of limitation represent a public policy judgment by a state as to the time at which an action becomes too stale to proceed in its courts. Statutes of limitation are primarily instruments of public policy and of court management, and do not confer upon defendant any right to be free from liability, although this may be their effect. Statutes of limitations serve interests peculiar to the forum, and are considered as going to the remedy and not the fundamental right itself. The Full Faith and Credit Clause of the Constitution does not require a state to substitute the limitation laws of other states for its own. In this case, the other states involved consider their own statutes of limitations to be procedural and affecting only the remedy, and not the fundamental right. All of the other states involved would apply their own statutes of limitations to actions brought in their courts, and their rights have not been infringed upon by Kansas doing that very thing in this case.

Kansas properly had jurisdiction of the defendant in this action. The defendant does business in Kansas and

is doing the same business in Kansas for which it is being sued in this case. Sun clearly could have expected to be sued in Kansas. If Sun had any expectation as to the statute of limitations which should apply, its only reasonable expectation would be that the limitation laws of Kansas would apply. There is nothing arbitrary or unfair about applying a state's limitation law, which deals primarily with implementing the state's own interests in furthering its public policy.

The Kansas Court correctly applied the laws of the other states under the proper constitutional standard and determined that all of the states would require Sun to pay interest at the same rate Sun had promised to pay to its pipeline customers on this same money, if the money had been refunded.

The decision of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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